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BOARD OF SUP'RS OF TAZEWELL COUNTY *v.* NORFOLK & W. RY. CO.

Sept. 11, 1916.

[89 S. E. 951.]

1. Highways (§ 21*)—Establishment—Width—Statutes.—Neither Act March 8, 1847 (Acts 1846-47, c. 100), providing that the road therein directed to be constructed should nowhere exceed a grade of four degrees and should not be more than 22 feet wide or less than 12 feet wide, nor Act Jan. 17, 1848 (Acts 1847-48, c. 143), Act March 7, 1849 (Acts 1848-49, c. 144), Act March 2, 1853 (Acts 1852-53, c. 86), directing the construction and completion of the first link in a turnpike, nor Act Jan. 30, 1850 (Acts 1849-50, c. 92), and Act Feb. 16, 1853 (Act 1852-53, c. 93), directing the construction and completion of the second link in such turnpike, of themselves established or located the turnpike or public road contemplated thereby, or fixed the width thereof, but merely controlled the wide discretion of the board of public works under Code 1849, c. 70, §§ 1, 2, when it came to take the land for the location of and the construction of the road.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 37; Dec. Dig. § 21.* 12 Va.-W. Va. Enc. Dig. 871.]

2. Evidence (§ 54*)—Presumption—Lost Record.—The court will not presume the existence of facts merely because records have been lost or destroyed; as such loss or destruction gives rise to no presumption.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 74; Dec. Dig. § 54.* 11 Va.-W. Va. Enc. Dig. 323.]

3. Evidence (§ 178 (3)*)—Loss of Records—Secondary Evidence.—The loss or destruction of records has the effect merely of changing the mode of proof of such records by the admission of secondary evidence in the place of an exemplification of the records.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 583; Dec. Dig. § 178 (3); Records, Cent. Dig. § 33.* 2 Va.-W. Va. Enc. Dig. 364.]

4. Highways (§ 68*)—Establishment—Acceptance.—Exhibits showing that a road was a public road in 1858 merely show the acceptance of the road by the county authorities as a public road, but do not show its establishment as a public road under and in pursuance of legislative acts.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 226-233; Dec. Dig. § 68.* 12 Va.-W. Va. Enc. Dig. 873.]

5. Highways (§ 21*)—Establishment—Width—Statutes.—Code 1904, § 944a(2), relating to the appointment of viewers to examine roads, etc., to be made by the board of supervisors of any county, and to

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

the width and grade of such roads, continuing the law of **Rev. Code** 1819, c. 236, § 7, etc., through the intervening Codes, did not itself have the effect of establishing public roads, or any public road 30 feet in width.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 37; Dec. Dig. § 37; Dec. Dig. § 21.* 12 Va.-W. Va. Enc. Dig. 864.]

6. Highways (§ 21*)—Establishment—Acceptance—Statutes.—Act March 8, 1847 (Acts 1846-47, c. 100), and other acts directing the construction and completion of the first and second links of a turnpike, or road, did not establish the road as a public road; as, where it was not the result of condemnation, acceptance did not supply its place so as to give title to a right of way in being but one element in obtaining title, dedication being the accompanying element.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 37; Dec. Dig. § 21.* 12 Va.-W. Va. Enc. Dig. 862.]

7. Highways (§ 1*)—Establishment—Prescription.—When dedication is implied from the long and continuous use of a road by the public for the prescriptive period of 20 years, and there has been an acceptance by competent authority, title to a right of way for a public road may be obtained by prescription.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.* 12 Va.-W. Va. Enc. Dig. 862.]

8. Highways (§ 14*)—Establishment—Prescription—Width.—The width of a public road acquired or established by prescription was limited to, and was the width of such road as was in use by the public at the time defendant railway company made changes in its location.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 21; Dec. Dig. § 14.* 12 Va.-W. Va. Enc. Dig. 862.]

9. Railroads (§ 94 (5)*—Change of Highway—Consent of County Court—Statute.—Under Acts 1874-75, c. 63, substantially carried into Code 1887, § 1094, in effect when defendant railroad altered the location of a public road, providing that any county road may be altered by any railway whenever it shall have made an "equally convenient roadway in lieu thereof," a railway changing the location of a county road was not required to obtain the consent or approval of the county court, and was only required to make an equally convenient road in lieu thereof.

[Ed. Note.—For other cases, see Railroads. Cent. Dig. § 270; Dec. Dig. § 94 (5).* 4 Va.-W. Va. Enc. Dig. 125.]

10. Railroads (§ 94 (6)*—Change of Highway—Burden of Proof—Provision for Equally Good Highway.—A railway company having acted *ex parte* under Acts 1874-75, c. 63, substantially carried into Code 1887, § 1094, in altering the location of a public road had the

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

burden of showing that it had performed its statutory duty of making "an equally convenient roadway in lieu thereof."

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 272, 273; Dec. Dig. § 94 (6).* 4 Va.-W. Va. Enc. Dig. 125.]

11. Railroads (§ 94 (6)*—Change of Highway—Duty of Railway—Suit—Pleading.—In a suit by the board of supervisors of a county involving the defendant railway's change in the location of a public road and charging its failure to comply with its statutory duty therein with respect to a crossing, where the bill alleged that a post office was the terminus of the road at the place of the crossing, and the answer alleged that the change in location began at a certain point, and that the present road was on the old location from a point to the post office or terminus, the fact was in issue whether the defendant had performed its statutory duty with respect to the original road all the way to the post office.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 272, 273; Dec. Dig. § 94 (6).* 4 Va.-W. Va. Enc. Dig. 125.]

12. Railroads (§ 95 (5)*—Public Road—Crossing—Duty of Railroad.—Under Acts 1874-75, c. 63 (Code 1887, § 1094), and Acts 1883-84, c. 422, § 1 (Code 1887, § 1095), permitting a railroad to cross any road if its crossing will not impair its safety, and requiring it as far as practicable to pass at surface grade or above or beneath any existing structure so as to admit safe travel, it was the duty of a railroad to construct the public road and its approaches on both sides of a crossing of the same width as the old public roadway, and to leave as easy a grade as could have been obtained by grading such road to the top of the railway at such crossing on either side.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 278; Dec. Dig. § 95 (5).* 4 Va.-W. Va. Enc. Dig. 125.]

13. Railroads (§ 95 (8)*—Highway Crossings—Compliance with Statute—Evidence.—Evidence in such suit held to show that the defendant railway had not complied with such statutory duty.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 281-283; Dec. Dig. § 95 (8).* 4 Va.-W. Va. Enc. Dig. 125.]

14. Judgment (§ 559*—Res Judicata—Civil or Criminal Proceeding.—In a suit by the board of supervisors of a county charging that defendant railroad had not complied with its statutory duty with respect to its change in the location of a public road, and its crossing of such road, a verdict in favor of the defendant railway in a prior criminal proceeding against it by the commonwealth for unlawfully obstructing the same road did not estop the board from prosecuting the suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1077, 1078; Dec. Dig. § 559.* 6 Va.-W. Va. Enc. Dig. 341.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

15. Railroads (§ 94 (6)*—Public Road—Change in Location—Compliance with Statute—Jurisdiction.—Where a railway company acted under a statute permitting it to change the location of a public road, if it made an equally convenient road, and to cross such road, and assumed to comply with its statutory duties, the court, although no contractual relation existed between the county and the railway, had jurisdiction to enforce the performance of such duty.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 272, 273; Dec. Dig. § 94 (6).* 4 Va.-W. Va. Enc. Dig. 125.]

16. Adverse Possession (§ 8 (2)*—Property Subject—Highways.—Public highways belong to the state, and the statute of limitations does not run against the state nor bar the rights of the public therein.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 44-50; Dec. Dig. § 8 (2); Highways, Cent. Dig. § 280.* 1 Va.-W. Va. Enc. Dig. 221.]

17. Equity (§ 85*)—Laches—Parties Subject—State.—Public Highways belong to the state, and the doctrine of or defense of laches cannot be set up in a suit in equity by the board of county supervisors involving the rights in a public road.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 221; Dec. Dig. § 85.* 9 Va.-W. Va. Enc. Dig. 107.]

Appeal from Circuit Court, Tazewell County.

Suit in equity by the Board of Supervisors of Tazewell County against the Norfolk & Western Railway Company. From a decree dismissing the bill and from a decree refusing leave to file a bill of review, the Board of Supervisors appeals. Reversed in part, and affirmed in part, and case remanded.

H. Claude Pobst, J. W. Harmon, and J. N. Harmon, all of Tazewell, for appellant.
Graham & Hawthorne, of Tazewell, for appellee.

NEW RIVER, H. & W. R. CO. *v.* HONAKER et al.

Sept. 11, 1916.

[89 S. E. 960.]

1. Eminent Domain (§ 237 (4)*—Assessment—Misconduct of Commissioners—Invalidity.—In a proceeding to condemn land for a railroad right of way where the commissioners to assess damages were entertained by one of the successful parties during their investigation, their award will be set aside, without regard to any actual influence on their award.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 610; Dec. Dig. § 237 (4).* 5 Va.-W. Va. Enc. Dig. 109.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digest and Indexes.